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No. 754

In the Supreme Court of the United States

OCTOBER TERM, 1948

THE STATE OF TEXAS, ET AL.,
Appellants

versus

THE UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Appellees

On Appeal From the District Court of the United States
For the Western District of Oklahoma

BRIEF OF STATE OF LOUISIANA, LOUISIANA PUBLIC SERVICE COMMISSION AND LIBBEY-OWENS-FORD GLASS COMPANY, APPELLANTS, IN OPPOSITION TO MOTION TO AFFIRM

INTRODUCTION

This case is now before the Court on a motion to affirm filed by appelles, United States of America and Interstate Commerce Commission, pursuant to Rule 12, Paragraph 3 of the Revised Rules of this Court. Appellants, State of Louisiana, Louisiana Public Service Com-

mission and Libbey-Owens-Ford Glass Company, file this brief in opposition to the motion, pursuant to Rule 7, Paragraph 3.

OPINION OF THE COURT BELOW

The majority and dissenting opinions of the Court below are attached to appellants' jurisdictional statement as Appendix "D". They were not reported.

JURISDICTION OF THIS COURT

Jurisdiction of this Court is invoked under the provisions of *28 U. S. C., Sections 1253 and 2101 (b)*. This is a direct appeal from the final judgment of a specially constituted District Court of three Judges established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing a suit by appellants, State of Louisiana, Louisiana Public Service Commission and others seeking to set aside an order of the Interstate Commerce Commission.

STATUTES INVOLVED

Relevant portions of statutes involved:

28 U. S. C., 1253

28 U. S. C., 2101 (b)

49 U. S. C., 13(4)

49 U. S. C., 17(9)

are set forth as Appendices "A", "B", "C", and "D", respectively, to this brief.

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STATEMENT

A specially constituted three-Judge District Court, established pursuant to the Urgent Deficiencies Act of October 22, 1913,/[1] one Judge dissenting, dismissed a suit by the States of Texas and Louisiana and their respective Railroad and Public Service Commissions seeking to set aside an order of the Interstate Commerce Commission prescribing intrastate rates in both States to supplant previously established state prescribed rates for the transportation by rail of dense soda ash,/[2] a commodity used in the manufacture of glass./[3] Complainants and three manufacturers of glass products, who intervened on their side,/[4] perfected a direct appeal to this Court. Appellees, contending that the appeal involves no substantial question and that appellants did not exhaust their administrative recourse as required by *49 U. S. C., 17(9)*, moved, pursuant to Rule 12, Paragraph 3, of the Revised Rules of this Court, to affirm the judgment of the District Court.

1/ **28 U. S. C., 41 (28), 43 to 48, inclusive,** now superseded by **28 U. S. C., 1253, 1336, 2101, 2284, 2321 to 2325, inclusive.**

2/ Hereinafter referred to as soda ash.

3/ The order of May 25, 1948, (Appendix "C" to appellants' jurisdictional statement), was made pursuant to, and put into effect, conclusions reached in the Commission's report and order of March 3, 1947, entered, after hearing, on the complaint of the Corporation Commission of Oklahoma and the Public Service Commission of Arkansas on behalf of manufacturers of glass products in those States, (Appendix "A" to appellants' jurisdictional statement), a petition for the reconsideration of which was denied September 4, 1947, (Appendix "B" to appellants' jurisdictional statement). Copies of the majority and dissenting opinions of the District Court are attached to appellants' jurisdictional statement as Appendix "D".

4/ Libbey-Owens-Ford Glass Company, Owens-Illinois Glass Company and Knox Glass Bottle Company of Mississippi with plants located at Shreveport, Louisiana, Waco, Texas, and Palestine, Texas, respectively.

SUMMARY OF ARGUMENT

Appellants' right to a review of the decision below by this Court is conferred by statute. The question presented by this appeal, whether or not the record contains sufficient evidence to support the Commission's order, is one of the most substantial questions that can be raised when the Commission acts pursuant to the authority conferred upon it by *49 U. S. C., 13(4)*, and has been the subject of consideration and adjudication by this Court in numerous cases.

Prior to instituting this suit complainants-appellants exhausted their administrative recourse as required by *49 U. S. C., 17(9)*. Any argument to the contrary admits that the Commission entered the order under consideration without an investigation and "the full hearing" required by *49 U. S. C., 13(4)*.

ARGUMENT

THE CONTENTION THAT THE APPEAL INVOLVES NO SUBSTANTIAL QUESTION

Appellees contend that the appeal involves no substantial question for the reason that it raises no issue other than the sufficiency of the evidence in the record to support the Commission's order. At the outset we submit that any appeal which raises such an issue necessarily involves a substantial question. The question of whether or not the record upon which the Commission acted contained sufficient evidence to justify its action has been

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considered by this Court in many cases of which *Florida vs. United States, 282 U. S. 194, 75 L. Ed. 291,* and *North Carolina vs. United States, 325 U. S. 507, 89 L. Ed. 1760,* are typical.

The contention that the issue raised should not be determined by this Court, and particularly the statement in appellees' motion that "A second judicial scrutiny of the record to determine the adequacy of evidence to sustain a rate order made by an administrative agency would be a burdensome exercise of appellate review not called for in the interest of orderly and efficient administration of justice," cannot be reconciled with the unqualified right of appeal conferred by Congress in *Section 1253 of Title 28, United States Code.*

In view of the conclusions reached by this Court in *North Carolina vs. United States, supra,* and cases cited therein, it is clear that the Commission is without authority to supplant a state-prescribed intrastate rate in the absence of sufficient evidence./[5] On the record which this case presents appellees contend, and appellants deny, that the Commission was authorized to enter the order under consideration. Obviously, this controversy can only be resolved by a decision of this Court after hearing on the merits. The substantial nature of the questions presented by the appeal is emphasized by the fact that one member of the Court below was of the opinion that the record did not contain sufficient evidence to support the

5/ Footnote 7 of appellees' motion, in effect, concedes this point.

Commission's order. A judgment sustaining appellees' motion would deprive appellants of their statutory right of appeal.

Appellees concede that the Commission was required to consider the reasonableness of the existing intrastate rates in their relation to the rates to complaining points in Arkansas and Oklahoma, but do not point out where in its report this consideration is shown. Such consideration necessarily involves a determination that either the interstate rate or intrastate rate is reasonable when tested by accepted standards. However, the reasonableness of neither rate is shown. The sole evidence on which the Commission acted in increasing the intrastate rates was the existence of a disparity between those rates and the interstate rates. In so acting, not only did the Commission exceed its authority as defined by this Court in *Florida vs. United States and North Carolina vs. United States, supra*, it also ignored its own statement of the limitation of its authority in this respect contained in its report and quoted in appellees' motion./[6]

The record contains no evidence that the intrastate rates assailed are unreasonable, from which it follows that

6/ The Commission's report states "As stated by the intervening manufacturers, in order to establish unlawful person-locality preference and prejudice within the meaning of section 3 or 13 of the act, it must not only be shown that there is an unjustified disparity in rates from a transportation standpoint, but that there is subsantial competition between the complaining parties and those alleged to be preferred so that the rate disparity may be said to result in disadvantage to the former and corresponding advantage to the latter. Complainant must show that shipments have been or will be made or prevented or that complainant has been or will be otherwise injured because of the rate disparity." (255 I. C. C., at 203).

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no determination of their reasonableness or of the reasonableness of the increase ordered could have been made by the Commission. Appellees recognize this fact by their contention that no issue of the reasonableness vel non of the intrastate rates arises in this case. This contention ignores the requirement of a determination of the reasonableness of the existing or prescribed rates inherent in numerous decisions of this Court to the effect that the Commission is without authority to raise intrastate rates above a reasonable level. *Georgia Public Service Commission vs. United States, 283 U. S. 765, 75 L. Ed. 1397; Florida vs. United States, supra; United States vs. Louisiana, 290 U. S. 70, 78 L. Ed. 181.* The prohibition against the Commission raising intrastate rates above a reasonable level obviously cannot be enforced if the Commission is permitted to raise such rates on the basis of a record devoid of evidence from which such level can be determined.

Appellees' remaining contentions relate to the asserted sufficiency of the evidence upon which the Commission acted and must be examined in the light of the recognized restrictions imposed upon the Commission when it enters the field of intrastate rate regulation.

Reference has been made to decisions of this Court holding that intrastate rates may not be raised above a reasonable level, nor increased solely on the basis of a disparity. There are many other restrictions on the au-

thority of the Commission to raise such rates relevant to a consideration of appellees' motion./[7]

It may not regulate such rates for the purpose of protecting interstate commerce from potential competition. *Florida vs. United States, supra.*

The justification for the exercise of the federal power within what would otherwise be the domain of state power must clearly appear. *City of Yonkers vs. United States, 320 U. S. 685, 88 L. Ed. 400.*

Its power over purely intrastate rates begins at the point where the action of the state would bring about the prejudice or discrimination prohibited by *Section 13(4) of the Interstate Commerce Act.* Up to this point the state's power is exclusive. *North Carolina vs. United States, supra.*

Intrastate transportation being primarily the concern of the state the Commission's power is dominant only so far as necessary to alter rates which injuriously affect interstate transportation. For this reason its orders increasing intrastate rates must meet "a high standard of certainty," must rest upon "clear findings, supported by evidence, of each element essential to the exercise of" the federal power and "justification for the exercise of the

7/ Appellees incorporate in their motion that portion of the Commission's report (see Footnote 6, this brief) holding that the Oklahoma and Arkansas complaining points were under the obligation of showing that the intrastate rates complained of had or would result in shipments being made or prevented, or that the complaining points had been or would be otherwise injured because of the rate disparity.

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federal power must clearly appear." *North Carolina vs. United States, supra,* and *cases cited therein.*

Appellees contend that justification for the Commission's action/[8] is found in a record said to demonstrate that the Arkansas and Oklahoma manufacturers are victims of a substantial competitive disadvantage which operates to their detriment and to the benefit of intervenors-appellants, their Texas and Louisiana rivals. The evidence cited as supporting this contention falls far short of the minimum requirement for federal regulation of intrastate rates.

Appellants concede that soda ash is an indispensable and substantial ingredient in the manufacture of glass products but point out that this fact does not alter the requirement that justification for the exercise of the federal power wihin the field of intrastate rate regulation must clearly appear.

Appellees' motion states that:

> "A witness from one of the complainants located at Fort Smith testified that his company is severely handicapped by its relatively high rates on soda ash, which constitutes 10.1% of its inbound materials in weight and about 50% in cost (excluding

8/ The Commission concluded that the Texas and Louisiana intrastate freight rates violated **49 U. S. C., Sections 1, 3 and 13 (4),** in that they gave an undue or unreasonable advantage or preference to the intrastate commerce of intervenors-appellants, manufacturers of glass products with plants located in Texas and Louisiana and were prejudicial to the interstate commerce of manufacturers of similar products located in Oklahoma and Arkansas and ordered these rates increased by four cents per one hundred pounds for shipments in carload lots.

cullet or scrap glass), as contrasted with silica sand which constiuttes 38.5% in both weight and cost. (Tr. 34-35)."

The statement that the Fort Smith company is severely handicapped by its rate on soda ash is nothing more than a conclusion. The cost of an ingredient constituting 10.1% of the weight of all ingredients used in the finished product is irrelevant in a consideration of the cost of the transportation of such ingredient, and the difference of a mere 8 *cents* per *ton* on *finished* window glass between the existing and the prescribed rate on soda ash conclusively demonstrates both the lack of a substantial competitive disadvantage operating to the detriment of the Fort Smith company as a result of the rate disparity and the futility of the Commission's attempt to equalize the competitive position of Fort Smith and Shreveport by the order under consideration./[9]

Although this is not the brief of Texas and the intervening glass manufacturers located therein, we point

9/ The Fort Smith, Arkansas, manufacturer mentioned, the Harding Glass Company, is the only complainant before the Commission competing with intervenor-appellant Libbey-Owens-Ford Glass Company located at Shreveport, Louisiana, and the latter is the only glass plant in Louisiana. Both of these companies manufacture window glass. **(268 I. C. C. 199).** The statement in the Commission's report that complaining manufacturers in competition with the Shreveport intervenor are also located at Henryetta and Okmulgee, Oklahoma, is misleading as neither of these manufacturers intervened, gave any evidence or otherwise participated in the proceeding. (Tr. 121). According to the testimony cited in appellees' motion 10.1% of each ton of window glass, or 202 pounds, represents soda ash incorporated in the finished product. The prescribed increase of 4 cents per hundred pounds in freight rate applicable to this product, therefore, represents an increase of only 8 cents per ton on the finished product, which conclusively shows that the rate on soda ash is not responsible for any handicap under which the Fort Smith manufacturer operates.

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out that the reasoning of the preceding paragraph is also applicable to the statement in appellees' motion that:

> "The testimony of another witness, Vice-President of the Kerr Glass Manufacturing Corporation at Sand Springs, Oklahoma, shows that soda ash amounts to 25% in weight of the raw materials used by that company, and amounts to 50 to 60% of the cost of raw materials used (Tr. 15-16)."

The difference between the existing and prescribed rate as applied to a ton of finished product here would be only 20 cents and could not contribute to any competitive disadvantage suffered by the Sand Springs manufacturer.

In support of the contention that Oklahoma and Arkansas manufacturers compete with intervenors-appellants and are adversely affected by the rate disparity the motion of appelles states:

> "That the glass manufacturers who are the victims, and those who are the beneficiaries, of the rate disparity are in active competition, selling their products in the same market, is likewise established beyond dispute by the evidence of record.
>
> The witness John Bernier, an officer of the company at Sand Springs, testified that his company serves the territory west of the Mississippi River and east of the Rocky Mountains in competition with products from Palestine and Waco (Tr.

16)./[10] In this witness' judgment, the higher rate on so important a raw material 'puts us at a very great disadvantage.' (Tr. 16).

A witness from Fort Smith testified that his company sells flat window glass in competition with Shreveport. His competitors there have a lower rate, and this disparity places his company under 'an enormous handicap' (Tr. 34-35).

10/ This company does not experience competition from Shreveport as its product is not manufactured there (Tr. 32)."

Appellees have, of course, referred to the strongest and most definite evidence which can be cited in support of the Commission's action. We submit that appellees' motion itself demonstrates that the dissenting Judge was eminently correct in concluding:

"The evidence upon which the Commission's findings are based, in my judgment, is incompetent, consisting of conclusions, and does not approach that 'high standard of certainty,' prescribed by the Supreme Court in North Carolina, et al., vs. United States, et al., 325 U. S. 507; Houston & Texas Railway Company vs. United States, 234 U. S. 342; Florida, et al., vs. United States, et al., 282 U. S. 194." (Appendix "D" to appellants' jurisdictional statement).

Obviously, there are many factors other than the freight rate on a single ingredient which determine the success or failure of a manufacturer in selling his product

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in a competitive market. Among these factors are his geographical location, the inbound rates on all ingredients used, the outbound rates on the finished product, the efficiency of his manufacturing process and of his advertising and sales organizations, the quality of his product, and the number, location and efficiency of his rivals. For all this record shows any or all of these factors are responsible for the competitive disadvantage, if any, of the Oklahoma/[10] and Arkansas manufacturers. We categorically state that the record contains no evidence that the rate disparity adversely affects the complaining manufacturers except unsupported expressions of opinion. Argument seems unnecessary to demonstrate that this evidence falls far short of the "high standard of certainty" prescribed by *North Carolina vs. United States, supra.*

The motion of appellees further states:

> "The witness, D. C. Hamilton, of the Bartlett-Collins Company of Sapulpa, manufacturing a low-cost grade of tableware, anticipated potential competition from Waco and Palestine, because although the plants there were manufacturing other articles, it would be simple to change the moulds and go into production of glass tumblers in a few days (Tr. 114-115). The witness' company at the time of the hearing had a surplus of orders on hand (Tr. 121). He testified regarding the lower rates enjoyed by Eastern competition in so-called 'Official Territory' (Tr. 123-124)."/[11]

10/ Attention is directed to the fact that the single Louisiana glass manufacturer, Libbey-Owens-Ford, does not compete with the complaining manufacturers located in Oklahoma.

11/ Testimony relating to competition from "Official Territory" has no bearing on the issues of this case.

Appellees contend that the Commission would have been justified in ignoring existing conditions and prescribing intrastate rates on the basis of potential future competition. This argument is irrelevant in view of the Commission's assertion that such evidence was not considered and is unsound in view of the decision of this Court in *Florida vs. United States, supra.*

Appellees' contention that proof of loss of specific sales or shipments as a result of the rate disparity is unnecessary ignores, as did the Commission's report and order, the Commission's statement that such proof is an indispensable part of the case of the complaining manufacturers./[12] The argument that such proof is not required is based upon the statement in the Commission's report that:

> "In the nature of things the exact effect on the marketing of the finished product can not be shown."

The above statement is tantamount to an admis-

12/ See Footnote 6, this brief. It also ignores established principles long recognized by the Commission:

"Although complaintants' witnesses refer generally to competitors having lower rates, there is no evidence of shipments from the alleged preferred points or that complainant's movement has been retarded because of the lower rates therefrom. We find that the allegation of undue prejudice has not been sustained." **Knoxville Freight Bureau vs. Southern Railway Company, 156 I. C. C. 315.**

"While undue prejudice and preference may be established by a preponderance of evidence, the evidence must be such as to make reasonably clear how and where the prejudice and preference result from a rate maladjustment of which complaint is made.

There may not be assumed or left to mere inference. General declarations as to competition or injury, unsupported by evidentiary facts, and a mere showing of a disparity of rates are not sufficient for predication of a finding of undue prejudice and preference." **Barrett Company vs. AT&SF Railway Company, 172 I. C. C. 319.**

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sion that the complaining manufacturers were unable to meet the minimum evidential standard of this type of case. It is significant that the case cited in support of this contention, *Federal Trade Commission vs. Morton Salt Company, 334 U. S. 37, 92 L. Ed. 1196*, does not involve the Interstate Commerce Act.

It is unnecessary for appellants to contend, as appellees assert they may, that the Commission should have related the interstate rate to the intrastate rate, in view of the above-mentioned violations by the Commission of the restrictions affecting its actions in the field of intrastate rate regulation.

The assertion that the intrastate rates were unduly low because of the producers' competition with Official Territory, or possibly because of inadvertent classification, is meaningless in view of the absence of any showing whatever of the reasonableness of these rates. Further, the existing intrastate rates were fixed as a result of the applications of the carriers transporting the soda ash (Tr. 124), and it is safe to assume that these carriers would neither apply for, nor acquiesce in the continued enforcement of, rates that were unduly low.

The complete disregard by the Commission of the restrictions surrounding its exercise of authority in the field of intrastate rate regulation is demonstrated by a summary of the Louisiana situation. As pointed out in Footnote 9 intervenor-appellant Libbey-Owens-Ford Glass Company operates at Shreveport, the only glass plant in

Louisiana. This plant obtains its soda ash from Lake Charles and North Baton Rouge, in the same State. The only complainant before the Commission who competes with Libbey-Owens-Ford Glass Company, at Shreveport, is Harding Glass Company located at Fort Smith, Arkansas. The Fort Smith manufacturer obtains no soda ash from North Baton Rouge and none from Lake Charles except in an emergency (Tr. 152). There is no evidence as to the volume of soda ash obtained in such emergencies. For all the record shows only one carload a year moves from Lake Charles to Fort Smith. It was upon this evidence, and upon a record subject to the numerous infirmities pointed out above, that the Commission found that the state-prescribed rate on soda ash from North Baton Rouge and Lake Charles to Shreveport, in Louisiana, was unduly and unreasonably advantageous and preferential to the intrastate commerce of Libbey-Owens-Ford Glass Company and prejudicial to the interstate commerce of Harding Glass Company, at Fort Smith, Arkansas, and ordered an increase of 4 cents per hundred pounds in the Louisiana intrastate rate. The arbitrary and unreasonable nature of the Commission's action is further illustrated by the fact that the intrastate rate established between Lake Charles and Shreveport, in Louisiana, is 68% of the interstate rate established between Lake Charles and Fort Smith, Arkansas, although the distance between Lake

Charles and Shreveport is only 40% as great as that between Lake Charles and Fort Smith./[13]

It is apparent that as to both states the Commission acted without sufficient evidence to justify an order under *Section 13(4) of the Interstate Commerce Act.* The majority decision below stands for the proposition that the Commission, when acting under the authority of that section, may declare an intrastate rate undue or unreasonable in relation to an interstate rate without inquiring into the reasonableness of either, that it may order an intrastate rate increased on the basis of disparity alone, that it may set aside an intrastate rate as prejudicial to the interstate commerce of a complaining shipper without evidence that a single shipment has been or will be made or prevented, or any business lost, as a result of the rate complained of and that it may base its orders on evidence consisting exclusively of opinions, conclusions and conjecture.

13/ The Commission's order establishes an intrastate rate on soda ash between Lake Charles and Shreveport of 21 cents per hundred pounds and an interstate rate of 31 cents on the same commodity between Lake Charles and Fort Smith. The distance between Lake Charles and Shreveport is 175 miles, that between Lake Charles and Fort Smith 437 miles.

THE CONTENTION THAT APPELLANTS DID NOT EXHAUST THEIR ADMINISTRATIVE RECOURSE AS REQUIRED BY 49 U. S. C., 17(9)

This contention was rejected by the Court below.

Appellees contend that under *Section 17(9) of the Interstate Commerce Act*, it is necessary that a reconsideration, rehearing or reargument be disposed of by the Commission as a whole, or an appellate division thereof, before resort may be had to the courts. The argument seems to be predicated upon a very narrow and, we submit, incorrect, construction of the pleadings in this case, as well as all proceedings taken before the Interstate Commerce Commission.

It is true that Paragraph 1 of the complaint states that this suit is for the purpose of enjoining the order of the Interstate Commerce Commission of May 25, 1948, entered by Division 3. It is equally true, however, that the complaint alleges in Paragraph 13, that on March 3, 1947, Division 3 of the Interstate Commerce Commission entered an order upon the subject and such order was attached as Exhibit "D"./[14] It is also true that in Paragraph 14 of the complaint, it is alleged that motions for reopening and reconsideration were filed in due time, and that these were overruled on September 4, 1947, by the Commission as a whole. The order of the Commission denying the rehearing is attached to the complaint as Exhibit "E"./[15]

14/ Appendix "A" to appellants' jurisdictional statement.
15/ Appendix "B" to appellants' jurisdictional statement.

It is further alleged in Paragraph 18 of the complaint that Division 3 of the Commission, on May 25, 1948, entered the final order complained of, and a copy is attached to the complaint as Exhibit "F"./[16]

The prayer of the complaint is as follows:

"3) That a permanent injunction be granted restraining the enforcement, operation, and execution of said ORDERS of the Interstate Commerce Commission, and that the same be annulled and set aside;

4) That Petitioners be granted such other and further relief as may be proper and just in the premises."

An examination of Exhibit "F" (order of date May 25, 1948) will disclose that that order did nothing except to put into effect the order which had been previously entered (Exhibit "D") by Division 3 of the Commission, and which order had been reviewed and reconsidered by the entire Commission on September 4, 1947. (Exhibit "E").

The wording of the last mentioned order (Exhibit "E") shows clearly that the point had been reconsidered by the entire Commission, and the order entered by it reads, in part, as follows:

"Upon further consideration of defendants' petition for reconsideration; petition of Knox Glass Bottle Company of Mississippi and Owens-Illinois Glass Company, intervenors, for re-argument and recon-

16/ Appendix "C" to appellants' jurisdictional statement.

sideration; petition of Libbey-Owens-Ford Glass Company, intervenor, for rehearing; petition of the Railroad Commission of Texas for reconsideration and petition of Louisiana Public Service Commission for rescission, annullment and cancellation of the order * * *."

It was ordered by the entire Commission that these petitions for reconsideration be denied.

As pointed out, the order entered on May 25, 1948, was merely an order to put into effect the decision which had already been reached and which had been reconsidered by the entire Commission.

The rules adopted by the Interstate Commerce Commission specifically provide that successive petitions for rehearing on the same ground will not be heard. This is covered by *Paragraph (f) of Rule 101 of the Interstate Commerce Commission*, which is as follows:

"SUCCESSIVE PETITIONS ON THE SAME GROUNDS, NOT ENTERTAINED—A successive petition under subdivision (d) of this rule filed by the same party or parties, and upon substantially the same grounds as a former petition, which has been considered and denied by the entire Commission, or by an appropriate appellate division, will not be entertained."

Appellees contend that since no petition for rehearing was filed specifically to the order of May 25, 1948, the complainants here did not exhaust their recourse before the Commission. The order of May 25, 1948, was

entered without a hearing. The matters embodied therein had already been heard by Division 3 of the Commission, and this Division had been upheld by the entire Commission. The very fact that the Commission thought that it was justified in entering such an order as that of May 25, 1948, without a hearing, indicates clearly that it considered that all matters involved in the order had been previously heard and determined by it.

None of the cases cited in appellees' motion are in point. It does not appear that any application for a reconsideration was made to the Commission in the District Court case cited in Footnote 16. *Industrial Addition Association vs. Commissioner, 323 U. S. 310, 89 L. Ed. 260,* involved a review by a Court of Appeals of a determination by the Tax Court. *Freeman vs. Bee Machine Company, Inc., 319 U. S. 488, 87 L. Ed. 1509,* dealt with the removel of a case from the state to the Federal Court. *United States vs. Griffin, 303 U. S. 226, 82 L. Ed. 764,* hold that the Urgent Deficiencies Act of October 22, 1913, does not confer upon a Federal District Court jurisdiction to review an order of the Interstate Commerce Commission made under the *Railway Mail Pay Act of July 28, 1916.*

As pointed out the complaint sets out the procedure by which the Commission arrived at its decision and upon which is based its order of May 25, 1948. Copies of the several orders which form the basis for the order of May 25, 1948, are a part of the complaint. The prayer of the

complaint, it will be observed, asks that the "ORDERS" be annulled—the word is in the plural deliberately and purposely, and asks that all orders constituting the foundation of the order of May 25, 1948, be annulled. It is submitted that it would be a very narrow construction of the complaint—in fact, it would de the complaint violence to construe it to mean that it has reference solely and exclusive to the order of May 25, 1948, standing alone.

Further, we point out that the complaint asks for general relief upon the facts alleged. If its previous consideration of the question by the Interstate Commerce Commission is not to be considered in the decision of this point, then it seems but logical to say that the Interstate Commerce Commission has entered an order, nullifying intrastate rates fixed by the proper authorities of the States of Louisiana and Texas, without an investigation and "the full hearing" required by *Paragraph 4 of Section 13 of the Interstate Commerce Act.* To put it another way—appellees cannot argue that the hearings previously held complied with *Paragraph 4 of Section 13*, but that the decisions previously made by the Commission on the subject and as a result of these hearings are not to be considered in the determination of whether or not a rehearing has been denied by the Commission.

It is submitted that appellants did exhaust their administrative recourse and that, under the express rules adopted by the Interstate Commerce Commission, they were barred from a second petition to the Commission for a reconsideration of the issues involved.

CONCLUSION

The motion to affirm should be overruled.

Respectfully submitted,

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APPENDIX "A"

28 U. S. C. 1253:

"Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

APPENDIX "B"

28 U. S. C. 2101:

"(a) A direct appeal to the Supreme Court from any decision under sections 1252, 1253 and 2282 of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court./*

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final."

*/ Subdivision (a) is quoted because of the relation of Subdivision (b) thereto.

APPENDIX "C"

49 U. S. C., 13(4):

"Whenever in any such investigation the commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minumum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classification, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any state or the decision or order of any state authority to the contrary notwithstanding."

APPENDIX "D"

49 U. S. C., 17(9):

"When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise."